BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MARK C. BYERS	)	
Claimant	)	
V.	)	Docket No. 1,065,481
	)	
ACME FOUNDRY, INC.	)	
Self-Insured Respondent	)	

ORDER

Claimant, through William Phalen, requests review of Administrative Law Judge Bruce Moore's June 16, 2015 Award. Paul Kritz appeared for respondent. The Board heard oral argument on November 17, 2015.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the Award's stipulations.

ISSUES

The judge concluded claimant refused to comply with respondent's post-accident drug testing policy by giving an inadequate urine sample to allow testing, such that he forfeited his benefits under the Kansas Workers Compensation Act. The issues are:

1. Did claimant forfeit workers compensation benefits by refusing to submit to a post-accident drug test, pursuant to K.S.A. 2012 Supp. 44-501(b)(1)(E)?

2. Is K.S.A. 2012 Supp. 44-501(b)(1)(E) unconstitutional?

FINDINGS OF FACT

Claimant testified three times – at an October 29, 2013 deposition, a March 12, 2014 preliminary hearing, and at a February 13, 2015 deposition. Three of respondent's employees testified in 2013. The judge only had the first-hand opportunity to witness claimant's preliminary hearing testimony.

Claimant worked as a grinder at respondent's plant for about two years. On May 13, 2013, around 5:20 a.m., he was grinding a piece of metal. Something struck and injured his left arm. Claimant indicated his arm was bleeding, he had to hold his arm because it would not support itself and he was in such severe pain that he went to the restroom and vomited. He reported the accident and was taken to the nurse's station. A company EMT took claimant to the Coffeyville Regional Medical Center emergency room. Claimant testified it took perhaps 90 minutes before respondent took him to the hospital.

Claimant was admitted to the emergency room at 6:00 a.m. The ER history stated claimant felt something pop while using an airgun. The ER record stated claimant had significant tenderness over his left biceps tendon and elbow and significant pain flexing his elbow, but no external signs of an injury. An MRI was performed for a suspected biceps tendon tear. It did not show a biceps tendon tear, but demonstrated moderate soft tissue swelling of claimant's antecubital fossa and a brachioradialis muscle belly strain. Claimant was told he would need to undergo another MRI the next day, May 14.

At his first deposition, claimant testified he did not know and was unsure if hospital personnel took blood or performed a drug test, but he had a picture in his head that they did take blood from him. He testified at the preliminary hearing that hospital personnel told him respondent wanted a urine test and no such test was done at the hospital, but hospital personnel took blood. At his second deposition, claimant testified he distinctly remembered that a blood test was taken at the hospital, but he did not know the results.

A hospital record stated, "Lab notified of need for workmans comp drug screen" at 6:09 a.m., and at 6:19 a.m., "Lab calls Acme to find out what type of drug screen needs done. Acme relays to them that they do not need one done."[1] The record does not indicate claimant had drug or alcohol testing at the hospital or that his blood was drawn.

Claimant testified he was confused and frustrated because respondent left him alone at the hospital without anyone to guide him through the process. During this time, he was given food and beverage, and had three injections, which provided him some pain relief. Hospital personnel contacted the company nurse, Jody Stritzke, and advised claimant was ready to be picked up. Nevertheless, claimant suspected respondent would not send someone to pick him up. He started walking back to the plant, which was close to two miles away. Not having a ride frustrated claimant. According to claimant, he was about halfway to the plant when Ms. Stritzke picked him up. Claimant was frustrated, angry and in pain.

Ms. Stritzke testified she picked claimant up a couple of blocks from the hospital around 2:20 p.m. To her, claimant seemed agitated. When she asked how he was doing, he responded he "wasn't doing very good, that he'd been there all day and he was sick and tired of questions being asked to him and he was ready to get away from everyone."[2] She then inquired if he had any restrictions or what his paperwork said. According to her, he kind of tossed or threw the paperwork at her. After informing claimant he would need to take a drug test when they returned to the plant, he "acted perturbed."[3] She acknowledged claimant had not refused to undergo drug testing at that point.

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[1] Stipulation of Medical Records at 10.

[2] Stritzke Depo. at 17-18.

[3] *Id*. at 24.

Respondent's drug and alcohol policy allows post-injury drug and alcohol testing. Claimant signed a consent form for post-injury drug and alcohol screening.

Claimant and Ms. Stritzke arrived at the plant. According to Ms. Stritzke, "he was still pretty agitated, and he said I thought we were going to do this drug test, and I said we are but I need to look at your paperwork. And he - - he was about in tears at that time. He just was - - was ready to go home. He wanted to get out of there. And I said look, I'm sorry, I'm only one person here. I need to get a witness . . . ."[4] She called Jane Hughes, a human resources assistant, to witness claimant give a drug test.

When collecting a urine sample for drug testing, respondent uses a pre-packaged container consisting of a collection cup with a lid (called the CRL Stat One-Step Onsite drug cup).[5] The container is stored in a plastic bag, which is opened in front of the individual to be tested. The collection cup is removed from the bag and the top is removed to show the test subject the cup is empty. The cup has a built-in temperature gauge and a line showing the amount of urine needed for testing. Once a sufficient amount of urine is in the cup and the temperature strip has turned green, preliminary field tests are administered to determine if prohibited drugs are present. If field testing suggests the presence of prohibited drugs, the cup is sealed, chain of custody forms are completed, and the sample is sent to a drug testing laboratory for formal testing. If field testing indicates a negative result, the matter is concluded without further testing.

Ms. Stritzke is in charge of respondent's UA program and is authorized by respondent to administer drug tests. She testified the number of drug tests depends on hiring and injuries, but respondent performs at least six random drug tests a week. She admitted she has had to administer two or three tests on one person because of defective cups. According to her, she will give a test and not get an accurate temperature reading approximately three times a month and she will have to pour the urine into a different cup.

When Ms. Hughes arrived at the nurse's station, she, Ms. Stritzke and claimant went into a restroom. Ms. Stritzke testified she unpackaged a collection cup, removed the lid, showed claimant the cup was empty and explained to him she needed a sufficient amount of urine (at least 30 milliliters) – above a temperature gauge line – and the temperature gauge needed to turn green or she could not use the urine sample. Ms. Hughes confirmed that Ms. Stritzke told claimant how much urine was needed to get a temperature, including that the sample needed to exceed the white strip above the temperature line, and that claimant appeared to understand and be cooperative. Ms. Stritzke asked him not to flush the toilet or run any water in the sink. She and Ms. Hughes then left the restroom with the door cracked between two and five inches.

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[4] *Id*. at 25.

[5] P.H. Trans., Resp. Exs. A1, A2 and A3.

Claimant testified respondent never told him how the cup works and he did not see a line on the cup. He testified he filled about one-half of the plastic cup with his urine.

According to Ms. Stritzke and Ms. Hughes, claimant's urine got up to a black temperature line on the cup. Ms. Stritzke tilted the cup, but was unable to get a temperature reading because there was not enough urine. Ms. Stritzke announced there was insufficient urine in the cup and she was not getting a temperature reading. According to her, claimant then left the restroom, picked up his hard hat and said "see you ladies later."[6] Claimant was about two feet away from her when Ms. Stritzke explained to him that there was not enough urine in the cup and he needed to wait because they still needed to finish the test. Claimant continued to walk away and Ms. Stritzke chased him out the door saying, "please don't leave, please don't go, you can lose your job if you don't finish your drug test."[7]

Ms. Hughes testified about what transpired:

> Um, he said he was leaving. Well, I don't know whether he said it; but he just walked out and picked up his hard hat and safety glasses; and Jody said, well, don't leave because we haven't finished the drug test yet; and he said I'm - - I'm going to leave. He just said I'm leaving, walked towards the door. She said again we have to finish this before you can go, and he just kept on walking, and then she went to the door following him. I think she actually even stepped outside the door and said that we needed to finish the drug test and that he - - if he walks out that he could possibly lose his job by us not finishing the process.[8]

Ms. Stritzke acknowledged it was possible the cup may have been defective, but she was unable to transfer the urine to a new cup for testing because she would need claimant's consent and he left without completing the chain of custody paperwork. She discarded the cup in the trash.

Both Ms. Stritzke and Ms. Hughes signed a post-accident drug and alcohol screening form that stated the temperature of claimant's test was "no temp." and claimant "Walked out! Did Not Complete."[9] According to Ms. Stritzke, the situation with claimant was the first time in her 17 years working for respondent that a worker simply left the building after giving a sample that registered no temperature reading. In other situations, the worker is given the opportunity to provide a sample in another cup when he or she is ready to urinate again.

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[6] Stritzke Depo. at 41.

[7] *Id*. at 44.

[8] Hughes Depo. at 31.

[9] *Id*., Ex. 1; see also Stritzke Depo., Ex. 1.

Claimant testified regarding his recollection of the events surrounding the drug test:

> Q. Okay, so when you got back to Acme, what happened?
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> A. Let's see, we go in the office, I sit down in a chair, she starts talking to me asking me how it happened and stuff. I think she goes off and gets a cup and we go to the bathroom, I pee in the cup, set it down, I go back out in the hall. She goes into the bathroom, she asks me to go in and sit down in the nurse's station. She comes back out, I don't know, she is going on and on about something, I can't hardly remember that much about that part but she said it wasn't, I don't know, wants me to take another one.
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> Q. Did she say why she wanted you to take another one?
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> A. No, she didn't. I don't think she did at the time.
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> Q. Okay, what happened next?
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> A. I was in so much pain all I could do was think about getting out of there. She keeps telling me I need to do another one, and if she has my prescription - - but only thing I was thinking about is my pain in the arm and going home, listening to her telling me I'm fired when I'm walking out the door or something like that.[10]

Claimant acknowledged Ms. Stritzke probably told him more than once that he needed to take another test. Claimant testified at his first deposition that Ms. Stritzke never explained why she wanted another test. At the preliminary hearing, claimant testified he asked her why he needed to stay to urinate again, but he did not remember what she told him in response and he did not know why he needed to give another urine sample.[11] Claimant acknowledged Ms. Stritzke followed him outside and told him to come back in the building to take another test.[12] He testified, "I think I might have said I give all I can give, got to go home, I'm in too much pain."[13] Claimant testified he complied with the UA test.[14]

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[10] Claimant Depo. (Oct. 29, 2013) at 30-31; see also P.H. Trans. at 26-27.

[11] P.H. Trans. at 19-20, 25.

[12] Claimant Depo. (Oct. 29, 2013) at 30, 34-35; see also P.H. Trans. at 26-27. He also testified Ms. Hughes tried to get him to take another test. Claimant Depo. (Oct. 29, 2013) at 38-39.

[13] Claimant Depo. (Oct. 29, 2013) at 35, see also pp. 38-39; P.H. Trans. at 20, 29-30.

[14] P.H. Trans. at 19-20, 28-29.

According to claimant's second deposition testimony, when they returned to the plant, he provided a urine sample as requested, even urinating as much as possible and emptied his bladder. He denied willfully refusing or intentionally hindering, obstructing or preventing the administration of the urine test. Claimant believed he had complied with and completed the urine test when he left the bathroom. He testified at that point, he just wanted to get his prescription filled and go home because all he was thinking about was his pain. Claimant further testified he was in so much pain he was not thinking rationally when he left respondent's premises and his actions were driven by his pain. Claimant denied Ms. Stritzke made it clear to him that he needed to retake the test and did not remember if she followed him out and asked him to retake the test.[15] Claimant testified about his condition and what he remembered when he left the building:

> When I walked out the door I was in enough pain, she was hollering I needed to talk to somebody else is what I remember. She said something about something else and I just wanted to get somewhere where I could lay down and get out of a little bit of pain I was in.[16]

Claimant testified he was in debilitating pain on the date of accident, notwithstanding that he walked part of the way from the hospital to Acme Foundry and drove home 35 miles or more to his residence in Parsons.

Ms. Stritzke told Jason Zimmerman, respondent's Director of Human Resources of 19 years, what occurred. Mr. Zimmerman told Ms. Stritzke to cancel an appointment claimant had with an orthopedic surgeon.

On May 14, 2013, claimant had a left elbow MRI that showed muscular strains of the brachioradialis, biceps brachii and brachialis muscles. That same day, claimant phoned Mr. Zimmerman to inquire why he was not going to be seen by the orthopedic surgeon. Mr. Zimmerman testified:

> Q. Then he calls up and what else did he say on the phone?
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> A. He wanted to know what was going on. I said I had an issue with the fact that he did not complete the drug test the day before and he told me that I would have refused to take it, too.
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> Q. Okay, and did you ask him, did it appear to you there had been a mix-up in the communications between my client and Jody?

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[15] Claimant Depo. (Feb. 13, 2015) at 32.

[16] *Id.* at 33.

A. No, but he said you would have refused to take it too. To me that meant he knew he was refusing to take the test.

Q. The second test?

A. Right, he was refusing to complete the test as directed by Acme Foundry.[17]

Mr. Zimmerman further testified:

> Well, when he said I would have refused, too, I asked him why he had refused and he said he had been there all day and just didn't want to do it, didn't want to take the test, and he was going home and I would have done the same thing in his shoes. And I told him that I wouldn't have, I would have complied with the drug test. And at that point he said so what you are telling me is that I'm terminated and I said I'm not saying that, I wanted to visit with you about why you didn't take the, or complete the drug test and he told me well, I'll just take it as I'm terminated and you will talk to my lawyer and hung up the phone."[18]

Mr. Zimmerman testified this instance with claimant was the first time one of respondent's workers gave an insufficient chemical test sample and simply left the building without first providing a valid sample.

At his initial deposition, which occurred after Mr. Zimmerman's deposition, claimant testified he did not remember much about his conversation with Mr. Zimmerman and he did not remember if he asked if he had been terminated.[19] At his second deposition, claimant denied telling Mr. Zimmerman that he refused to give a urine sample or a sufficient sample.

Following the preliminary hearing, the judge stated:

> Implicit in the statute's requirement for submission to a chemical test, is a requirement that the employee provide a sufficient sample for testing. Provision of an inadequate sample denies the employer the opportunity to conduct testing, and defeats the purpose of **K.S.A. 2012 Supp. 44-501(b)(1)(E)**.
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> . . .

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[17] Zimmerman Depo. at 38.

[18] *Id*. at 44-45.

[19] Claimant Depo. (Oct. 29, 2013) at 43.

> Claimant refused to comply with Respondent's post-accident testing policy by giving an inadequate urine sample to allow testing. **K.S.A. 2012 Supp. 44-501(b)(1)(E)** mandates that he has forfeited benefits under the workers compensation act.[20]

The preliminary hearing Order was appealed and affirmed by a single Board Member in a June 9, 2014 Order, to the extent K.S.A. 2012 Supp. 44-501(b)(1)(E) applied.

Edward J. Prostic, M.D., a board certified orthopedic surgeon retained by claimant, evaluated him on July 19, 2013. Claimant complained to Dr. Prostic of a continued ache about his radial forearm going toward his hand, occasional locking up of the elbow and intermittent numbness and tingling which worsened with active grip.

Dr. Prostic's physical examination revealed no heat, swelling, erythema, atrophy, range of motion limitations, joint instability, upper arm power loss or obvious synovitis. Notable findings only included mildly decreased pinch strength and sensory discrimination. Claimant also had a mildly positive flexion compression median nerve test and mild tenderness of the lateral epicondyle. Dr. Prostic observed a scar over claimant's left brachial radialis muscle, which he testified was likely due to a previous injury.

Dr. Prostic diagnosed claimant with lateral epicondylitis and carpal tunnel syndrome and recommended gripping exercises. Dr. Prostic opined claimant's May 13, 2013 accident was the prevailing factor causing his injury and need for medical treatment.

Dr. Prostic re-evaluated claimant on July 16, 2014. Claimant complained of continued pain about the lateral elbow which worsened with use of his hand, in addition to intermittent numbness and tingling to the ulnar side of his hand. Dr. Prostic's examination revealed a positive flexion compression ulnar test, mild tenderness of lateral epicondyle, moderate supination and pronation weakness, normal pinch strength and abnormal sensory discrimination to the ring and little fingers. Dr. Prostic diagnosed claimant with lateral epicondylitis and cubital tunnel syndrome and opined such conditions were due to repetitious minor trauma and claimant's specific May 13, 2013 accident. Dr. Prostic noted if claimant had a positive EMG, he would recommend cubital tunnel surgery.

Dr. Prostic assigned claimant a 20% functional impairment to the left upper extremity based upon the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). He noted carpal tunnel and cubital tunnel syndromes are very often or most often repetitive injuries. When asked how claimant sustained repetitive injuries from a specific injury, Dr. Prostic testified:

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[20] ALJ Order at 4.

> Well, his work as a grinder is hard on the peripheral nerves, so I think that each and every workday as a grinder he was injuring those nerves and it didn't come to his awareness until after the single traumatic event, so the swelling and whatever else happened related to this event allowed it to become worse and brought it to his attention.[21]

Dr. Prostic also testified claimant sustained a significant blow to his forearm that caused significant swelling. Further, such swelling was significant enough to cause both carpal tunnel and cubital tunnel syndromes.

Claimant testified he has numbness and weakness in his left hand, elbow and shoulder, he can only lift 5-10 pounds, he often drops things and is incapable of working. He testified his arm scar is from this injury. Claimant has not sought treatment, including over-the-counter medication, because he cannot afford it.

On page eight of the June 16, 2015 Award, the judge stated:

> This is not a case where the employer contends that it had probable cause to test for drugs or alcohol, and there is no contention that the employee was under the influence of alcohol or drugs at the time of the accident. This is a case where the employer had a policy authorizing post-accident testing, Claimant was aware of that policy, Claimant had an accident, and Claimant refused to provide a sample sufficient to enable Respondent to conduct the testing authorized by statute and its own policy. This is not a case where the claimant was ***unable*** to provide a sample. Claimant never told anyone at the time that he was unable to provide any more urine. Nor did he advise that he was in too much pain to provide a sample. When advised that the sample was insufficient, Claimant responded with "See you ladies later," and left the premises, refusing to discuss the matter further.
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> If Claimant had advised Ms. Stritzke that he was ***unable*** to provide any more urine, this court might reach another result. Here, Claimant simply refused to give a sufficient quantity of urine to allow testing, and refused to discuss the matter when advised his sample was insufficient, even if it might lead to his termination. When Claimant spoke with Jason Zimmerman the next day, he acknowledged that he had refused to provide a sufficient sample, and argued that Zimmerman would have refused as well. While Claimant now denies that he made that statement to Mr. Zimmerman, there are sufficient concerns about Claimant's credibility to give more credence to Mr. Zimmerman's version of events.
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> Claimant argues that there have been problems with defective urine sample cups in the past, and that the cup that was provided to Claimant on May 13, 2013 was defective because it did not register a temperature. He argues that the sample

[21] Prostic Depo. at 22.

provided by Claimant should have been poured in another cup to see if a temperature would register. In essence, Claimant asks the court to speculate that the sample was of an adequate temperature and that the cup was defective. Claimant fails to address his refusal to provide a sufficient **quantity** of urine to be considered a testable sample.

Claimant refused to comply with Respondent's post-accident testing policy by giving an inadequate urine sample to allow testing. **K.S.A. 2012 Supp. 44-501(b)(1)(E)** mandates that he has forfeited benefits under the workers compensation act.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501(b)(1)(E) states:

An employee's refusal to submit to a chemical test at the request of the employer shall result in the forfeiture of benefits under the workers compensation act if the employer had sufficient cause to suspect the use of alcohol or drugs by the claimant or if the employer's policy clearly authorizes post-injury testing.

In *Seybold*,[22] a Board Member analyzed the meaning of "refusal" for a chemical test by looking at how the Kansas Supreme Court defined the word "refusal" in the context of K.S.A. 44-518:

The better method to discern the meaning of "refusal" is to look at Kansas Supreme Court precedent precisely concerning the definition of "refusal" in the context of our workers compensation law. This Board Member sees no reason to define "refusal" for K.S.A. 2012 Supp. 44-501(b)(E) purposes any differently than the Kansas Supreme Court defined "refusal" for K.S.A. 44-518 purposes in *Neal*:[23]

> The very nature of the language used in 44-518 suggests that before suspension of benefits, there must be an affirmative act on the part of the employee to frustrate the employer's discovery or examination. In our interpretation of 44-518, we follow a familiar maxim of statutory construction which provides: "Ordinary words are to be given their ordinary meaning, and a statute should not be so read as to add that which is not readily found therein or to read out what as a matter of ordinary English language is in it. [Citation omitted.]" *GT, Kansas, L.L.C. v. Riley County Register of Deeds*, 271 Kan. 311, 316, 22 P.3d 600 (2001).

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[22] *Seybold v. Simplex Grinnell*, No. 1,067,611, 2014 WL 889883 (Kan. WCAB Feb. 18, 2014).

[23] *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, 81 P.3d 425 (2003).

> Black's Law Dictionary defines "refusal" as "[t]he act of one who has, by law, a right and power of having or doing something of advantage, and decline it." Black's also indicates that the declination of a request or demand, or the omission to comply with some requirement of law, be "*as the result of a positive intention to disobey*." (Emphasis added.) *Refusal* is often coupled with "neglect," but Black's notes that neglect signifies a mere omission of a duty "*while 'refusal' implies the positive denial of an application or command, or at least a mental determination not to comply*." (Emphasis added.) Black's Law Dictionary 1282 (6th ed. 1990).
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> "Obstruct" is defined as "[t]o hinder or prevent from progress, check, stop, also to retard the progress of, make accomplishment of a difficult and slow.... To impede." Black's Law Dictionary 1077 (6th ed. 1990).
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> The ordinary meaning of the words used in K.S.A. 44-518 contemplate a positive intention to disobey and to hinder. We believe K.S.A. 44-518 contemplates circumstances where an employee makes a deliberate decision not to attend the examination or to obstruct or prevent the employer from gathering its own independent evaluation of his medical condition. Thus, the Board's interpretation that there must be an element of willfulness or intent is consistent with the ordinary meaning of the words of K.S.A. 44-518.
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> . . .
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> Based upon the cases cited above and the clear import of K.S.A. 44–518 we, like the Board, conclude that the terms "refusal" and "unnecessarily obstructs" carry with them an element of willfulness or intent.[24]

The Board must follow the mandate of *Bergstrom:*

When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).[25]

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[24] *Id.* at 15-16.

[25] *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

ANALYSIS

The Board affirms the judge's denial of benefits based on K.S.A. 2012 Supp. 44-501(b)(1)(E). Therefore, claimant forfeited any benefits he could have been awarded.

Respondent, at oral argument, acknowledged there is no evidence claimant was intoxicated. However, respondent's policy allowed post-injury testing, so respondent did not need to have sufficient cause to believe claimant had been using drugs or alcohol. Whether claimant was intoxicated is irrelevant to the issue of whether claimant refused to submit to respondent's request to take a chemical test, at least based on the plain language of K.S.A. 2012 Supp. 44-501(b)(1)(E).

While claimant produced some urine for respondent, his actions demonstrate a refusal to submit to a chemical test. Even though he was told the sample was inadequate, he simply said, "see you ladies later." After being told the test was not finished, he left respondent's premises, despite Ms. Stritzke imploring him to stay and complete the test, lest he risk losing his job. Claimant acknowledged hearing Ms. Stritzke tell him as he left that he needed to take another test. Ms. Hughes confirmed much of Ms. Stritzke's testimony. According to Mr. Zimmerman, claimant acknowledged refusing the test when they spoke the day after the accident. These facts show claimant demonstrated a positive and willful intention to not fully comply with the testing, and to disobey, hinder, obstruct or prevent respondent from obtaining a sample sufficient for testing.

The Board finds respondent's witnesses more credible than claimant. Claimant's testimony was inconsistent. He testified at his second deposition that Ms. Stritzke did not make it clear that he needed to retake the test and she vaguely said "something about something else" when he was leaving respondent's premises. However, he testified nearly the opposite at his first deposition and the preliminary hearing, including that he asked Ms. Stritzke why he needed to stay and take another test. Similarly, claimant did not remember much about his conversation with Mr. Zimmerman when he initially testified by deposition, but when he testified by deposition a second time, he was able to deny telling Mr. Zimmerman that he had refused to give a urine sample or a sufficient sample. We conclude claimant told Mr. Zimmerman that he refused to take the attempted chemical test.

Claimant asserts he submitted to a chemical test because he produced some urine into a test cup. The Board does not agree. Providing an insufficient sample is not akin with submitting to a chemical test. Claimant was told the amount of urine was insufficient and the testing was not finished, i.e., he did not complete the test. This case is unlike *Seybold*, where a claimant attempted to complete a drug test, but was unable to do so for medical reasons. A nurse told Mr. Seybold she would simply record that he was unable to give a sample and that he could go home.

We pause to acknowledge some of claimant's concerns that do not directly address whether he submitted to a chemical test. We do not find claimant was in so much pain that he had a legal excuse to refuse to submit to chemical testing. Whether the test cup may have been defective is speculative. Even if the cup was defective, claimant refused to comply with testing instructions. Whether Ms. Stritzke should have poured the insufficient amount of urine into another test cup or should not have disposed of the insufficient sample, whether a blood test at the hospital would have been better or whether claimant's inadequate urine sample should have been sent to an offsite laboratory do not address or affect the Board's conclusion that claimant refused to submit to a chemical test.

Claimant argues K.S.A. 2012 Supp. 44-501(b)(1)(E) is unconstitutionally vague and violates due process and equal protection. The Board does not have the authority to hold an Act of the Kansas Legislature unconstitutional. Claimant may preserve his arguments for future determination before a proper court.

CONCLUSIONS

The Board affirms the judge's forfeiture of benefits based on K.S.A. 2012 Supp. 44-501(b)(1)(E). We cannot rule whether such statute is unconstitutional.

AWARD

WHEREFORE, the Board affirms the June 16, 2015 Award.

IT IS SO ORDERED.

Dated this _____ day of December, 2015.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Honorable Bruce E. Moore